SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 297.

THE UNITED STATES,

Appellant,

against

FREDERICK MAISH AND THOMAS DRISCOLL, PARTNERS, AS MAISH & DRISCOLL,

Appellees.

BRIEF ON BEHALF OF THE SOPORI LAND & MINING COMPANY.

Appellees Maish and Driscoll filed their petition in the Court of Private Land Claims, praying confirmation of a Mexican grant of lands situated in Pima County, Arizona, commonly known as the "San Ygnacio de la Canoa" land grant.

When the case was reached for trial, it appearing that the Sopori Land & Mining Company had also filed a petition for the confirmation of said grant, the Court ordered that company to be made a party defendant; whereupon said company appeared by its counsel (record, p. 11), and the trial proceeded as upon a consolidation of said two petitions, resulting in a decree adjudging "that the claim of the petitioners and of the defendant, the Sopori Land & Mining Company, for the tract of land embraced within the said grant as designated by the aforesaid map, be and the same is confirmed to the heirs and legal representatives of the said Tomas and Ygnacio Ortiz;" (record, p. 101), from which decree this appeal is taken by the United States.

No citation on the appeal was served upon the Sopori Land & Mining Company and it is not named in the appeal papers as

a party to the action, but it has entered its appearance herein by its counsel and this brief is filed in its behalf; and also, with the consent of their counsel, in behalf of said Maish & Driscoll, the interests of said appellees and said company in this action being the same.

Claim to the land involved is asserted under a title issued February 2, 1849, by Antonio Teran y Peralta, then treasurer general of the state of Sonora, Mexico, to Tomas and Ygnacio Ortiz, which title was based on proceedings had in the year 1821 upon a petition by the said Ortiz brothers to the intendent of the provinces of Sonora and Sinaloa, resulting in a sale of said lands by and under the direction of said intendent to the petitioners, and the payment by them of the purchase money. These proceedings up to and including the survey of the land and the thirty pregones or advertisements for the sale were had prior to the achievement of Mexican independence, September 28, 1821. The final sale and payment were made after that date, the money going into the treasury of the newly established nation. (Record, pp. 30-49.)

It is conceded that the grant papers are genuine; that the original expediente remains in the archives of Sonora; that the grant is properly entered in the book of Toma de Razon, and is in the usual and regular form and shows the proceedings customarily observed in making such grants.

A survey of the grant discloses that there are within the monuments mentioned in the title papers, 10 and 76-100 sitios instead of 4 sitios as therein stated, and it is claimed on the part of the United States that the grant is one for the specific quantity of 4 sitios within the larger tract marked by the boundaries mentioned, and that as the particular 4 sitios had not been designated prior to the treaty of 1853, the grant was not then located within the meaning of that treaty and hence is not within the jurisdiction of the Court of Private Land Claims to confirm.

Confirmation was and is also resisted by the government on the ground that the title was not lawfully and regularly derived, because the officer who issued it had no power to do so.

The claimants contend:

1. That Antonio Teran y Peralta, as treasurer general of the state of Sonora, had lawful authority to issue grants of

vacant public lands within that state, and that the title issued by him in this case being based upon proceedings uniformly recognized by the government of that state, and of the nation, as a proper and lawful foundation for the issuance of final title, and being complete and perfect in form, vested in the grantees the fee of the lands described.

2. That if this be not so, yet that the proceedings prior to the issuance of final title vested in the grantees a right under Mexican law to demand that their title should be made perfect, and that, therefore, the United States are bound to respect said grant, and the decree confirming the same is correct.

3. That the grant is one by metes and bounds according to a survey actually made, and conveys title to all the lands within the boundaries named, though in excess of the quantity stated; or

4. In case the grant be one of quantity embraced within the larger tract marked by the boundaries, that it was "located" within the meaning of the treaty of 1853.

The facts appearing in evidence on the trial in the Court below are stated in the other briefs filed herein, and need not be here repeated.

ARGUMENT.

I.

The power of the Treasurer General to make grants and issue titles to vacate public lands.

The documents evidencing this grant are regular in every matter of form; their genuineness is conceded; the expediente is found in the Mexican archives; the original testimonio was produced upon the trial in the Court below, coming from proper custody, and the grant is entered in Toma de Razon. The issuing of the title thus evidenced raises the strongest presumption that the officer who assumed to issue it had power to do so under Mexican laws. This principle was early established and has been uniformly recognized and acted upon by all branches of our government in dealing with grants of land made by the former sovereigns of acquired territory.

In the leading case of U. S. vs. Arredondo, 6 Pet., 728, this Court laid down the rule that

"The acts of public officers in disposing of public lands by color or claim of public authority, are evidence thereof until the contrary appears by the showing of those who oppose the title set up under it and deny the power by which it is professed to be granted. Without the recognition of this principle there would be no safety in title papers and no security for the enjoyment of property under them."

Again, in U. S. vs. Peralta, 19 How., 347, the Court said:

"The presumption arising from the grant itself makes it *prima facie* evidence of the power of the officer making it, and throws the burden of proof on the party denying it."

To the same effect are

Delassus vs. U. S., 9 Pet., 134.
U. S. vs. Clarke, 8 Pet., 452.
Strother vs. Lucas, 12 Pet., 438.
And many other cases.

It is not necessary, however, to rely upon presumption. The title itself refers to the laws under which it was issued, and, upon examination, they will be found to confer the power claimed.

To determine whether these laws were valid and were in force in 1849, when this title was issued, it is necessary to examine briefly the constitutional and statutory law of Mexico touching the distribution of powers between the nation and the states, and governing the disposition of the public lands.

On February 24, 1822, the Constituent Congress, elected under the provisions of the plan of Iguala and treaty of Cordova, assembled at the City of Mexico for the purpose of forming a constitution, but, instead, elected Iturbide as emperor on May 19, 1822, and was by him dissolved in the following October. The Congress re-convened in March, 1823, in which month Iturbide abdicated and the Congress declared that all the acts of his government, including a colonization law passed in January, 1822, were illegal.

Reynolds, 31-32.

This Constituent Congress, on January 31, 1824, adopted what is known as the Constitutive Act of the Mexican federa-

tion, which continued to be the fundamental law until the adoption of the Constitution in October of that year. It formed the basis of that Constitution and is referred to in connection with it in subsequent legislation as forming part of the organic law of the nation.

This Constitutive Act declares:

"Art. 1. The Mexican Nation is composed of the provinces comprised in the Viceroyalty, formerly called New Spain, in what was called the Captaincy General of Yucatan and in the commandancies General of the Internal Provinces of the East and of the West."

* * * * * * * *.

"Art. 5. 'The nation adopts for the form of its government, a popular, representative and federal republic.' ".

"Art. 6. 'Its integral parts *are free, sovereign and independent states, in so far as regards exclusively its internal administration*, according to the rules laid down in this act and in the general constitution.' "

"Art. 7. The states at present comprising the federation *are* the following, viz: Guanajuato, the internal state of the west, composed of the provinces of Sonora and Sinaloa," etc., etc.; "the Californias and the District of Colima will for the present be territories of the federation, and directly subject to its supreme power."

1 White, New Recop., 374 et seq.

The language used indicates that prior to the adoption of the constitution of 1824, the Mexican states were independent of each other and not merely political sub-divisions of a single state.

That this is the view taken by the Mexicans themselves is apparent from the wording of the "Act of Constitutional Reforms," adopted May 18, 1847, at the close of the most turbulent period in the country's history, that during which it had been governed under the so-called Central System.

This Act in its preamble recites:

"That the States of Mexico, *by a spontaneous act of their own individual sovereignty*, and to consolidate their independence, guarantee their liberty, provide for the common defense, establish peace and procure the welfare thereof, formed a confederation in 1823, and afterwards in 1824, constituted a political system of union for their general government, under the form of a popular, representative republic, and upon

the pre-existing foundation of their natural and reciprocal independence."

Reynolds, 281.

From the foregoing, it would seem beyond dispute that the provinces in New Spain, which revolted against the mother country upon achieving their independence, became sovereign and independent states. If so, it is undeniable that they possessed the title and right of disposition to the public lands within their borders as fully and completely as did the state of Texas, when, by like means, she secured her independence from Mexico.

August 4, 1824, the Constituent Congress passed a decree for the classification of the revenues, which is the first law referred to in our title. The first ten articles of that law specify the sources of the revenues of the federation.

Article 11 is as follows: "The revenues not included in the foregoing articles belong to the states."

Reynolds, 118.

August 18, 1824, a colonization law was adopted by the Congress, which contains the following provisions:

"Art. 1. The Mexican Nation offers to foreigners who may come to establish themselves in its territory, security in their persons and in their property; *provided*, they submit to the laws of the country."

* * * * * * * *

"3. For this purpose the Congresses of the states shall enact, as soon as possible, laws or regulations for the colonization of their respective demarcations, in strict conformity with the Constitutive Act, the general constitution and the rules established in this law."

* * * * * * * *

"16. The government, under the principles established in this law, shall proceed to the colonization of the territories of the republic."

Reynolds, 121-2.

Inasmuch as the first ten articles of the law of August 4, 1824, make no mention of the public lands or the revenues to

be derived therefrom, it is clear that this act, so far as it has any bearing upon the question, indicates that those lands and revenues belonged to the states. As will hereafter be seen, the states so construed it and acted upon that construction for many years, to the knowledge of the national government, and without protest on its part. This construction is further supported by the terms of the Act of August 18, 1824, above quoted, which, in its third article, committed to the Congresses of the states the enactment of laws for the colonization of their respective demarcations, while in Art. 16, it was provided that the national government should proceed to the colonization of the territories.

The Constitution, which was adopted October 4, 1824, contains the following:

"Art. 4. 'The Mexican nation adopts for the form of its government a popular, representative and federal republic.' "

"Art. 5. 'The *constituent parts* of the federation *are* the following states and territories, viz: The states of Sonora and Sinaloa, etc., etc.; the territories of Lower California, Upper California, Colima and Santa Fe, De Nuevo Mexico.' "

1 White, New Recop., 388.

It will be perceived that in the Constitution, as in the Constitutive Act, there are no creative words used in speaking of the states. It is not said that the former Spanish provinces are erected into states or that they shall hereafter be states, or that the Mexican nation shall be divided into states, but that they *are* states, sovereign, free and independent.

The Constitutive Act speaks of "the states of the federation." The Constitution says that the nation adopts for the form of its government, a "federal republic." These terms import a compact or agreement between independent bodies and a union for the purposes of the compact.

An address issued by the Congress which framed the Constitution, explaining and urging its adoption, shows that that instrument was patterned after the Constitution of the United States. Among other things, it says that, in discharging its functions, "it had fortunately to do with a people obedient to the voice of duty and *a model to imitate in the flourishing republic of our neighbors to the north.*" (1 White, 382.) This declaration emphasizes what is apparent from the language of

the Constitution itself, that it was the intent to establish a dual system of government similar to our own; each sovereign and independent within its sphere.

The Constitution is silent in regard to the public lands. It contains no cession of them by the states, nor any grant of authority over them to the nation. If, therefore, the public lands belonged to the states prior to the adoption of the Constitution, they remained their property after it went into effect.

3 Washb. on Real Prop., 164-5.
Terrett vs. Taylor, 9 Cranch, 50.
Clark vs. Smith, 13 Pet., 195-201.

The several Mexican states acted upon this view of their rights.

Chihuahua passed a law for the disposal of its public lands May 26, 1825.

Reynolds, 132.

Coahuila and Texas passed a law for the same purpose May 24, 1825.

Republic vs. Thorn, 3 Tex., 499.

And on May 20, 1825, the State of the West (Sonora and Sinaloa) passed the "Provisional law for the regulation of the purchase of the lands of the state," which is the second law referred to in the Canoa title. This law fixes the price at which the public lands shall be sold, prescribes the duties of the several officers having charge of the sale of lands, and establishes conditions upon which they shall be granted. Among other provisions are the following:

"19. The treasurer, as the immediate chief of all the revenues, shall make the sales and give the titles."

* * * * * * * *

"31. Those who have an order for the registry of *sitios*, under the former practice, are guaranteed by this law."

Reynolds, 130-131.

The State of the West also embodied in its Constitution, adopted October 31, 1825, the following article plainly asserting its title to the public lands:

"Art. 109. The attributes of Congress are:

* * * * * * *

"XX. To make regulations for colonization in conformity with the laws."

Reynolds, 137.

So, also, the State of Coahuila and Texas, in its Constitution adopted March 11, 1827, asserted that "all kinds of vacant property within its limits and all intestate property without a legal successor shall belong to the state."

Chambers vs. Fisk, 22 Tex., 522.

On July 11, 1834, the Congress of the State of Sonora, that state having been previously separated from Sinaloa, adopted the "Organic law and provisional regulations for the treasury of the State of Sonora." This law established a complete system for the administration of the fiscal affairs of the state, prescribed the sources of revenue and the duties of officers in connection therewith, and enacted comprehensive regulations touching the sale of the public lands. Among others, it contained the following articles:

"Art. 53. The revenues and fees established in the state are:

* * * * * * * *

2. Revenue from the composition and grant of lands.
3. Fees for titles to grants of lands."

* * * * * * * *

"Art. 60. The treasurer, as the immediate chief of all the revenues, shall make the sales and issue the titles."

Reynolds, 187-188.

These constitutional provisions and laws of the several states relating to the sale of their public lands must have been known to the general government, for the national constitution in sub-division 9 of article 161, provided that each of the states is obligated:

"IX. To forward to the two Chambers, and, when they are in recess, to the Council of Government, a certified copy of their Constitutions, Laws and Decrees."

1 White.

This provision was doubtless inserted in the national constitution for the reason that the national congress, instead of the courts, was made the judge of the constitutionality of the laws and had the power to annul laws of the states if unconstitutional.

It must be presumed that the state officers discharged the duty thus imposed upon them, and that the national government was promptly advised of the laws of the several states.

That these laws of the State of Sonora were never annulled by the general government under the federal system is persuasive evidence of their validity, and that under that system the states possessed the power of alienating the public lands.

Clinton vs. Englebrecht, 13 Wall., 434.
Gonzales vs. Ross, 120 U. S., 605.

Especially is this so in view of the fact that the national government was uniformly jealous of encroachments upon its prerogatives and freely exercised its power to annul laws of the states if in conflict with the constitution.

Both the Constitutive Act and the Constitution of 1824 contain specific grants of power to the national government and enumerate the powers surrendered by, or withhold from, the states; but the power to sell vacant lands is in neither instrument given to the former nor denied to the latter.

Indeed, none of the constitutions or constitutive acts, prior to the constitution of 1857, contained any provisions with reference to the disposition of the public lands, and prior to that date the general government never annulled laws of the states on the ground that the latter did not possess the power of alienation, though laws were annulled for conflict with the colonization law of 1824 respecting grants to foreigners within the border or littoral leagues.

By article 72 of the constitution of 1857, however, the national congress was given power for the first time "to fix the rules to which the occupation and alienation of public lands ought to be subject, and the price of said lands." Under this provision the federal government in 1862 declared null and void a resolution passed by the Congress of the State of Sinaloa, claiming the right to alienate public lands, and in the same year also annulled laws of the State of Chihuahua passed

in 1857, 1858, 1861 and 1862, which applied to the revenue of the state the price of lands sold.

Hamilton's Mexican Law, 151-152.

It is thus seen that when power over the alienation of public lands was given to the federal government, it was prompt to annul laws of the states conflicting therewith, and the inference from its non-action prior to that time would seem irresistable that it did not then possess the power.

Not only were the laws of the states providing for the disposition of public lands not annulled, but the right and power of the states to enact such laws was repeatedly recognized by the general government.

The provisions of the general colonization law of 1824 directing the states to enact laws for the colonization of the lands within their demarcations have already been quoted. Though passed before the adoption of the federal constitution, it remained in force and seems to have been treated as a part of the organic law of the nation. This law, together with the regulations for carrying it into effect, adopted in 1828, continued to be the sole source of power under which governors made grants in California and other territories until the period of the Mexican war.

U. S. vs. Vallejo, 1 Black, 541.
U. S. vs. Vigil, 13 Wall., 449.

The regulations of 1828, above referred to, were adopted three years after the passage of the state laws hereinbefore quoted, and, being made applicable only to the territories, clearly indicate that control over the public lands in the states was conceded to them.

On April 6, 1830, the federal congress passed a law, from which the following is taken:

"Art. 3. The government shall have power to appoint one or more commissioners to visit the colonies of the frontier states, *to contract with their legislatures for the purchase, in the name of the Federation*, of the lands they may consider suitable and sufficient for the establishment of colonies of Mexicans and of other nations, to enter into such arrangements with the colonies already established as they may deem proper for the

security of the republic, to see to the exact compliance with the contracts upon the entry of new colonists, and to examine as to how far those already entered into have been complied with.

4. The executive shall have the power to take the lands he may consider suitable for fortifications and arsenals, and for new colonies, and shall give the states credit for their value on the accounts they owe the Federation."

Reynolds, 148.

Of this law the Supreme Court of Texas has said: "It contains a plain and unequivocal recognition of the full right of the state to the vacant domain in her limits, and of her right to dispose of it."

Chambers vs. Fisk, 22 Tex., 528.

Again on April 18, 1835, another law was passed relative to the grant to Iturbide, which contained this provision:

"2. The twenty square leagues referred to in the same decree, and which he desired in Texas, shall be given to his administrator and heirs in the Territories of New Mexico or Upper and Lower California, *if it can not be done in Texas*, in such manner as the government may agree upon with those interested."

Reynolds, 192.

From the foregoing we think it most clearly appears that at the time of the establishment of the Mexican government, the title to the public lands within the states was vested in them with full power of disposition, except as limited in certain particulars not important here, and so remained at least until 1835. It is shown by the laws passed by the states to the knowledge of the general government; by the omission of the general government to annul those laws, though possessing the power had they been unconstitutional; by the express and implied recognition contained in the federal laws, and by the continued and frequent exercise of such powers by the state officers as appears from the evidence in this case.

The same conclusion as to the power of the states to make sales has been reached in the courts of Texas, though they have taken the view that the title and power of the states was not

inherent in them and did not exist prior to the colonization law of 1824 and the federal constitution, but were therein conceded by the general government.

Republic vs. Thorn, 3 Tex., 499.
Chambers vs. Fisk, 22 Tex., 504.

And this Court has said, in a case involving a grant in Texas initiated in 1830 and completed in 1833, that "the power of the governor of those states to sell lands to Mexicans not exceeding eleven leagues in quantity, is unquestionable."

Spencer vs. Lapsley, 20 How., 269.
Approved in McPhaul vs. Lapsley, 20 Wall., 284.

That the laws of Sonora of 1825 and 1834 authorized the issuing of the Canoa title by the treasurer general, is not disputed, nor is it contended that the title is not in strict conformity with those laws.

It must also be admitted that prior to the issuing of the Canoa title, these laws had never been repealed by express reference to them in any law or decree of the national or state government.

There is but one law of the national congress passed while the federal system existed which in terms attempts to prohibit any of the states from alienating their public lands, viz: that of April 25, 1835, which aimed primarily to annul a law of Coahuila and Texas. After declaring in Art. 1 that the law annulled was contrary to the general colonization law of August 18, 1824, this law provides in Art. 2:

"2. In the exercise of the powers the general government reserved to itself in Article 7 of said law of August 18, 1824, the border and littoral states are prohibited from alienating their public lands for colonization thereon, until the rules they shall observe in doing so are established."

Reynolds, 193.

It will be observed that this article prohibits the alienation of lands for purposes of colonization only, and purports to be based upon Article 7 of the law of 1824. That law, it will be seen by reference to its first article, refers especially and per-

haps exclusively to the colonization of lands by foreigners, and Art. 7, above referred to, enacts that:

"7. Prior to the year 1840 the general congress shall not prohibit the entry of foreigners to colonize, unless imperious circumstances force it to it with respect to the individuals of some particular nation."

Reynolds, 121.

While the language of Art. 2 of the law of April 25, 1835, may be broad enough to prohibit the alienation of lands for colonization either by native Mexicans or by foreigners of any nation, yet being expressly based upon and in the exercise of powers conferred by Art. 7 of the law of 1824, its effect can not, upon any principle of construction, be extended beyond the scope of that section which, as above shown, only authorized the Congress to prohibit the entry of foreigners to colonize. Thus construed, the law of 1835 does not prohibit the granting by the states of lands to native Mexicans, either as donations for purposes of colonization or by way of sale.

Arguello vs. U. S., 18 How., 539-548.

But it seems to be supposed that the laws of Sonora were abrogated or repealed by certain acts and decrees of the national government for the time being, and especially by the act which purported to abolish the states and establish the central system of government, and the laws promulgated by the ruling powers during the ascendancy of that system.

It is unnecessary to determine in this case the effect of these laws upon titles issued by state officers while the central system of government was in existence, for it had passed away long prior to the date of our title. That question is raised, and will have been fully discussed in other cases before this Court.

That for a few stormy years, beginning in October, 1835, a centralized system of government established and upheld by military power, was imposed upon the states of the Mexican Union, is not to be denied, nor that this central government passed laws which might be construed and were perhaps intended to strip the states of the power to dispose of their public lands. That system and those laws were submitted to by the states at times and at others were resisted. Texas

never acquiesced. Sonora yielded obedience for a time at first, but from 1838 to 1841 claimed its rights as a state, and her officials discharged their functions in accordance with state laws. So other states protested against the aggressions of the central government. These facts, to which others might be added, show that the centralized system never had the united support of the states or people. In fact, it soon began to decay, and its decadence had so far progressed by the year 1841 that Santa Anna and the officers of his army felt obliged to summon a congress to form a new constitution. They promulgated the "Bases of Tacubaya," in which it was declared that "the immense majority of the departments and nearly all the army have forcibly and definitely stated that they did not desire, nor did they consent to the continuation of the affairs and of the men who have governed our destinies since the year 1836." A provisional government was established and bases adopted for the organization of the republic containing the following provisions:

"First. The so-called supreme powers established by the constitution of 1836 cease in their functions by the will of the nation."

* * * * * * * *

"Fifth. The extraordinary Congress shall meet six months after the election is ordered, and shall transact no further business than the formation of the constitution."

Reynolds, 234-6.

This congress convened in June, 1842 and was dissolved in December of that year without having fulfilled its mission. At its dissolution Santa Anna was virtually made dictator by a council of notables, summoned under the Bases of Tacubaya. In June of 1843 the dictator promulgated a new constitution, and in January of the following year the general congress provided for therein, convened, and seems to have continued in existence until the final overthrow of the central system in 1846.

Reynolds, 36-37.

On August 4, 1846, the generals, chiefs and officers assembled in the citadel of Mexico, put forth what is known as the Plan of the Citadel, in which they recited:

"First. That, since the Constitution, which the republic freely and spontaneously gave to itself, ceased to exist, those which have afterwards been made have not been conformable with the exigencies and *desires of the great majority of the nation.*"

* * * * * * * *

"Fourth. That all the laws the present Congress may enact and the acts of the government being *void*, because neither the one nor the other is legitimate, there is, therefore, always an existing reason for the motive to continue demanding the exercise of its incontestable rights, usurped by the present administration."

Reynolds, 253.

And thereupon they proclaimed as part of a plan for the true regeneration of the republic:

"Art. 1. In the place of the Congress that now exists, another shall be assembled, composed of representatives elected by popular vote, pursuant to the electoral laws, that served for the election of that of 1824, which shall, in that manner, be charged with constituting the nation."

Reynolds, 254.

August 22, 1846, the Constitution of 1824 was provisionally re-established and the Central System finally disappeared.

Reynolds, 256.

From the foregoing brief outline it must be apparent that the centralized system of government, originating without constitutional warrant, was constantly opposed by the weight of public sentiment and finally forced by it to give way to the popular, representative republican form of government established at the beginning of the nation. The language above quoted from the various bases, plans and decrees put forth during the existence of the Central System is the more significant since it comes from the mouths of its originators and upholders. The Bases of Tacubaya and the Plan of the Citadel both confess that the will of the people was opposed to the constitutions and laws imposed upon them. These matters give additional point and weight to the law to be next referred to.

In December, 1846, the congress provided for in the Plan of the Citadel, elected in accordance with the constitution of 1824, assembled, and on May 18, 1847, passed an act of constitutional reforms.

This act fully re-established the old constitution with certain additions and amendments. To its provisions here quoted especial attention is invited, as they are believed to be of the utmost importance in the decision of this case.

"In the name of God, creator and conservator of societies, the extraordinary, constitutent Congress, considering:

That the States of Mexico, *by a spontaneous act of their own individual sovereignty*, and to consolidate their independence, guarantee their liberty, provide for the common defense, establish peace and procure the welfare thereof, formed a confederation in 1823, and afterwards in 1824 constituted a political system of union for their general government, under the form of a popular, representative Republic, and *upon the pre-existing foundation of their natural and reciprocal independence;*

That that compact of alliance, the origin of the first constitution and the only legitimate fountain of the supreme power of the Republic, *subsists* in all its primitive vigor, and is, and must be, the principle of every fundamental institution;

That this same constitutive principle of the federal union, if it has been opposed by a superior force, could not and can not be altered by a new constitution;

And that, in order to further consolidate it and make it effective, in reforms which experience has demonstrated to be necessary in the Constitution of 1824, are necessary, has resolved to declare and to decree, and in use of its full powers, does declare and decree:

I. *That the States that compose the Mexican Union have recovered the independence and sovereignty that were reserved to them in the Constitution for their interior administration.*

II. That said States continue under the compact that at one time constituted the political mode of being of the people of the United States of Mexico;

III. That the Constitutive Act and the Federal Constitution, sanctioned on the 31st of January and the 4th of October, 1824, form the only political Constitution of the Republic;

IV. That these codes shall be observed with the following Act of Reforms.

* * * * * * * *

Art. 30. When this Act of Reforms is published all the public powers shall conform to it. The general legislature shall continue deposited in the present Congress, until the

assembling of the chambers. *The States shall continue to observe their own Constitutions, and shall renew their functionaries in accordance therewith.*"

Reynolds, 281-287.

Attention has already been called to the first paragraph in the preamble to this act, in which it is declared that the confederation in 1823 and the constitution of 1824 were formed by the States of Mexico "by a spontaneous act of their own individual sovereignty," "and upon the pre-existing foundation of their natural and reciprocal independence."

The language of other portions of the act in connection with this declaration is equally significant. It is recited that the compact of alliance found in the Constitutive Act is the only legitimate fountain of supreme power and still subsists. That though opposed by superior force, it could not be altered, and then it is declared and decreed that the States of the Mexican Union have "recovered" the independence and sovereignty that were reserved to them in the constitution for their interior administration. Herein is found the clearest implication that the central system of government was an usurpation from which the States had happily been relieved.

If the States "recovered" their independence and sovereignty for their interior administration, it is plain that they recovered also the laws they had themselves enacted in that behalf. But that there should be no misunderstanding in this regard, the act in Art. 30 declares: "The States shall continue to observe their own constitutions, and shall renew their functionaries in accordance therewith."

This act of constitutional reforms was not the edict of a military commander, a Plan or Bases adopted by a self-constituted body, or a law passed without constitutional warrant by a subservient congress, but was a solemn enactment by a congress elected in accordance with the original constitution of the nation. This congress was the only one so elected, or which can be said to have fairly represented the Mexican people, since the revolutionary suppression of the state governments in 1835. It convened at the close of a period of ten years of almost constant revolution and was called for the express purpose of rehabilitating the national government. The dec-

lations of this body, assembled under such circumstances, are entitled to the greatest weight.

The express language of the act shows that whatever may have been the effect of the legislation under the central system, the constitutions and laws of the states were revived in full force in 1847.

If it be conceded that under the centralized system the central government, whether existing *de jure* or only *de facto*, had power to regulate sales of lands, the laws passed to carry out that power did not work a repeal of the state laws, but merely rendered them inoperative for the time being, and upon the fall of the centralized system and the restoration of the federal system by which the states recovered the independence and sovereignty reserved to them in the constitution for their interior administration, the laws of the states again came into full force and effect.

Williams vs. Bruffy, 96 U. S., 174.
Thorington vs. Smith, 8 Wall., 1.
Tua vs. Carriere, 117 U. S., 201.
Sturgis vs. Spofford, 45 N. Y., 446.
Commissioners vs. Steamship Co., 52 N. Y., 609.
Henderson vs. Spofford, 59 N. Y., 131.

That the states so understood it, and that their power to dispose of the public lands, even if suspended during the central system, was recovered, is proven by the fact that they proceeded to exercise that power. It appears from the evidence in this case that during the years between 1847 and 1852, the State of Sonora issued more than fifty titles.

Not only did the state officers thus construe the laws, that construction was placed upon them by the national government, as appears from the following order addressed to the governor of the State of Sonora:

"Most Excellent Sir—The Supreme Government is informed that, on account of the disturbances in Upper California, especially in the gold placers, robbery and murders have increased, and that the hatred of Mexicans, Spaniards and Chilians has gone so far as to prevent their living there and that they have been forcibly compelled to re-embark, and

further information has been added to this, which indicates that in that country there are no social guarantees.

This has attracted the attention of his excellency, the president, and he, therefore, directs me to say to your excellency that he expects you to do all that is possible to attract to yourself this population, in the understanding that public lands will be given to the emigrants on credit, *and that, if that state does not cede them gratuitously or if the emigrants cannot pay, it will be given them, nevertheless, as the general government obligates itself to indemnify said state in the manner to be determined at the proper time by the general Congress.*

God and Liberty. Mexico, August 30, 1849.

LACUNZA."

Reynolds, 294.

This order, dated six months later than the Canoa title, was issued in furtherance of the decree of August 19, 1848 (Reynolds, 288-293), providing for the removal of Mexican families from the territory surrendered to the United States by the treaty of Guadalupe Hidalgo. By offering to indemnify the state for lands upon which these immigrants might settle, it recognizes in the plainest terms the title of the state.

Again, the decree of December 3, 1855, repealing Santa Anna's decrees of 1853 and 1854, which required submission to the revision and approval of the supreme government of grants or alienations of public lands made by the states or departments, declares in Art. 2 that all titles issued by the states under the federal system "shall for all time be good and valid as well as those of any other property lawfully acquired, and in no case can they be subject to any revision or ratification on the part of the government."

Reynolds, 329.

This decree manifestly was not intended to make good invalid alienations, but merely to do away with the cloud cast upon titles by the decrees of Santa Anna and set at rest any question as to their effect. It is declaratory of pre-existing rights, not a grant of new ones.

The construction thus placed upon the state and national laws by both state and national officials fully supports our contention that at the time the Canoa grant was made, the state had full power in the premises, and this construction should be respected and followed.

Ainsa vs. U. S., 161 U. S., 208.
Fremont vs. U. S., 17 How., 561.
Hornsby vs. U. S., 10 Wall., 224.
Sutherland Statutory Construction, Sec. 309.

II.

This title having been lawfully issued by the Treasurer-General, and being complete and perfect, it is immaterial whether the prior proceedings vested in the grantees the right to demand that their title be made perfect or only a meritorious claim.

The grant in this case is complete and perfect within the meaning of the act of March 3, 1891. The phrase "complete and perfect" is obviously used in contra-distinction to the phrase "which are not already complete and perfect." Both refer to the state of the proceedings for the acquisition of title, and not to the legality of those proceedings.

Ainsa vs. U. S., 161 U. S., 208.
U. S. vs. Santa Fe, 165 U. S., 675.

A complete and perfect title, in the sense in which those words are here employed, is one which required no further act of the government to convey the fee to the claimant.

Paul vs. Perez, 7 Tex., 338.
Hancock vs. McKinney, 7 Tex., 384.
Stevenson vs. Bennett, 35 Cal., 424.
U. S. vs. Arredondo, 6 Pet., 691.
U. S. vs. Reynes, 9 How., 127.
U. S. vs. Phila, 11 How., 609.
U. S. vs. Clarke, 9 Pet., 436.
U. S. vs. Sibbald, 10 Pet., 313.
McMicken vs. U. S., 97 U. S., 216.
Trenier vs. Stewart, 101 U. S., 797.

See form of such a title appended to Menard's Heirs vs. Massey, 8 How., 293.

The Canoa title fully meets all requirements. It purports to grant the fee of the lands described, and nothing remained to be done by the government to carry it into effect.

This being the case, and it being within the power of the officer to issue the title, it is immaterial whether the basis upon which he exercised his power was a legal right in the grantees to demand a title, or an equitable claim upon the justice of the government.

The proceedings anterior to the issuing of the title were had before Mexico achieved her independence. They had been carried on so far as to give to the grantees at the least an equitable claim upon the new government. This claim was protected by the treaty of Cordova, which contained the usual clause respecting the protection of private rights.

The Mexican government habitually respected rights such as those acquired by the Ortiz brothers, and uniformly perfected such inchoate titles.

Arguello vs. U. S., 18 How., 539.
U. S. vs. Peralta, 19 How., 343.

This being true, a title issued by competent authority in accordance with the usage and custom of the republic, though based upon an equitable or moral claim only, is just as lawfully and regularly derived as though it had been issued in satisfaction of a strict legal right.

III.

Whether the Treasurer-General had power to issue the title or not, the prior proceedings gave to the Messrs. Ortiz the right to demand that their inchoate title should be made complete and perfect.

Counsel for Maish & Driscoll have discussed the validity and effect of the proceedings before the intendent as dependent upon the written law of Mexico. Fully concurring in the views expressed, it is believed that there is still another ground

upon which it should be held that the proceedings, prior to the issuing of final title in 1849, vested in the Ortiz Bros. an inchoate title, which, under Mexican law, they could as a matter of right demand to have made complete and perfect, and that, therefore, the judgment of the Court of Private Land Claims should be affirmed, even though claimants' title was not complete and perfect at the time of the treaty of 1853.

Whatever may have been the power of the Treasurer General or of other Mexican officials under the written laws of the nation or the states with respect to the issuing of final titles based upon proceedings similar to those in the case at bar, it is incontestible that under all the forms of government prevailing in both the nation and the states, it was the uniform custom to issue such titles. That custom had continued for more than twenty-five years prior to the issuing of the Canoa title, and for more than thirty years prior to the cession of the territory in which the land covered by that title is situated. It had, therefore, acquired the force of law and is embraced within the "laws and ordinances of the government from which it (the grant) is alleged to have been derived."

There can be no question about the existence of this custom, whether it was based upon the provisions of the written law cited in the brief of counsel for Maish & Driscoll, or upon the construction of their powers by the Mexican executice officers in the absence of any express statutory authority. The summary of expedientes offered in evidence in this case under stipulation and printed in the record on pages 52 to 58, shows 59 titles issued by state or federal officers upon proceedings begun before the Mexican independence. The recently published report of Special Agents Tipton and Flipper on the condition of the archives or records of the titles to land grants in Arizona and similar grants in Mexico, contains notes of a still larger number issued on similar proceedings. The existence of this custom was recognized by this Court, and such inchoate titles were confirmed in some of the California cases.

Arguello vs. U. S., 18 How., 540.
U. S. vs. Peralta, 19 How., 343.

Under the Mexican law this custom, so long and uniformly followed, acquired the force of law, and individual rights were as much protected thereunder as by the written law.

"Custom," says Eschriche, "is the practice long used and received which has acquired the force of law. In order that custom may be legitimate and not corrupt, it is necessary that it should have been introduced with the tacit consent of the legislator; that it be conformable to the general welfare, and that it should have been observed for the space of ten years. Legitimate custom acquires the force of law not only when there is no law to the contrary, but also when its effect is to abrogate any former law which may be opposed to it, as well as to explain that which is doubtful. Hence, it is said that there may be a custom without law, in opposition to law, and according to law."

Eschriche's Derecho Espanol, 23-24.
1 White, 360.
Von Schmidt vs. Huntington, 1 Cal., 55-64.
Panaud vs. Jones, 1 Cal., 488-498.
Castro vs. Castro, 6 Cal., 158.
Donner vs. Palmer, 31 Cal., 500-522.

Every country has a common law of usage and custom by which rights may be acquired, and a right so acquired is as inviolable as if it was founded on a written law.

Strother vs. Lucas, 12 Pet., 410-437.

That this law of custom and usage or common law is embraced within the "laws and ordinances of the government" from which it is alleged the grant was derived, which by section 7 of the act of 1891 is made one of the rules for the guidance of the Court of Private Land Claims, is the settled doctrine of this Court.

In U. S. vs. Arredondo, 6 Pet., 691-714, the Court construed this rule expressed in the same words in the act of May 26, 1824, and held that it embraced not only written laws, but also usages and customs which from long observance have acquired the force of law.

In Strother vs. Lucas, *supra*, this Court, in speaking of the word laws as used in a treaty, said: "This Court has uniformly held * * * that in the term 'laws' is included custom and usage when once settled, though it may be comparatively of

recent date, and is not one of those to the contrary of which the memory of man runneth not, which contributed so much to make up the common law code which is so justly venerated."

12 Pet., 436.

And the Court will notice judicially the customary as well as the written law.

Fremont vs. U. S., 17 How., 557.
U. S. vs. Perot, 98 U. S., 428.
U. S. vs. Chaves, 159 U. S., 452.

Under the authorities above cited it is submitted that the custom existing and acted upon by both state and national officers for more than thirty years prior to the Gadsden purchase, had become a part of the Mexican law, and that under it, regardless of the written law, the Messrs. Ortiz could as a matter of right have demanded that their title be made complete and perfect. If so, then, supposing the title issued by the Treasurer General to be invalid for want of power in him, because that power belonged to the national government, there is presented a case in which the claimants could by right, and not by grace, have demanded that their title should be made perfect by the former government had the territory not been acquired by the United States, and therefore are entitled to its confirmation under the act of March 3, 1891.

This custom is entitled to the greater respect as being the law of the land, in view of the fact that Mexico was bound by the treaty of Cordova to respect rights such as those of the Canoa claimants, and that the mode in which the duty of the Mexican government in that behalf should be discharged was a matter to be determined by the political department. No law has been found which in any wise conflicts with the exercise of the powers shown to have been habitually assumed by the national and state officers, but, on the contrary, there are many passages in the Mexican laws which show that the Mexican government recognized the obligation to perfect such grants and intended that it should be fulfilled, as, for instance, Art. 31 of the law of May 20, 1825, which provides that "Those

who have an order for the registry of sitios under the former practice are guaranteed by this law."

Reynolds, 131.

It may here be observed that the Spanish word in the Mexican law which is translated "are" is "quedan," the very word used in the Florida treaty, which it was held in the Arredondo case should be translated "shall remain." Giving it that translation in the article above quoted, it will be seen that that article implies and recognizes former guarantees.

The custom was not against law, but clearly in accordance with law, and no reason is perceived why it should not be regarded as of equal force with the written law.

IV.

The extent and location of the grant.

An accurate survey of the grant discloses that there is embraced within the bounds mentioned in the title papers, a considerably greater quantity of land than is stated therein. This has raised the question whether the grant was one by metes and bounds or one of quantity. It is believed that no other conclusion can be reached upon a fair construction of the terms of the grant itself, except that it is one of the former class.

Before proceeding to the consideration of the language of the titulo, it should be observed that there is no uncertainty as to the location of the monuments established at the time of the survey in 1821. The testimony of Mr. Bonillas (record, 14-16) is clear and convincing, and leaves no reasonable doubt as to the accuracy of his survey or that he found and identified eight out of the nine boundary monuments. The center or starting point of the grant and the north center monument are shown to be well-known places, and both the north and south boundaries were also boundaries of other tracts. In this respect the case at bar is in marked contrast with Ainsa vs. U. S., 161 U. S., 208.

It is further distinguished from that case also by the fact that in the Ainsa case the record of the original survey showed

that it had been made partially by estimate, while in this case nothing of the kind appears.

Coming now to the terms of the titulo, it is seen that the Messrs. Ortiz, by their petition, registered four sitios of land which had not theretofore been surveyed, and prayed the Intendent to order "that the commanding officer of this military post proceed to the *survey of the registered land*, and take the other steps necessary for obtaining title and confirmation." This petition unquestionably shows that the petitioners desired to have a particular tract of land surveyed and designated, so that they might obtain title thereto.

Thereupon the Intendent ordered that the commanding officer "will proceed to the survey of the land which the petitioner registers, calling the adjacent neighbors, and will appoint expert appraisers, who shall fix a just price," etc. Why should adjacent neighbors be called if no definite tract was to be measured, and how could it be told who were adjacent neighbors? This order, which is the foundation of all the subsequent proceedings by the officials, contains no intimation that a tract was to be surveyed within which there should be thereafter located for the claimants some particular four sitios, but, on the contrary, its express words, and every direction in it, point to the final designation of a particular tract, and the carrying out of proceedings "into such a shape as to present them to me in this special Court, that the corresponding title may be issued."

The survey describes itself as "the survey of the land registered." The surveyor and his assistants measured from the starting point north "378 cordeles, when they reached a place called Saguarito," from whence they measured westerly "50 cordeles, which brought them to a hill." They measured easterly from the Saguarito "50 cordeles, which brought them on the same low ground." Returning to the original starting point, they measured westerly "50 cordeles, which brought them to a little knoll," and measuring easterly from the same starting point "50 cordeles, at the end of which they arrived at a vast low table land." So with the other measurements; they are all definite and have fixed termini, at which were placed marks or monuments in addition to the natural objects described in the field notes, and as a conclusion the survey says: "Thus the said measurements were entirely concluded,

giving as a result four sitios for the raising of cattle and horses, registered by Tomas and Ignacio Ortiz." This is the first mention made in the survey of the area of the grant, and it is distinctly and positively stated that that area results from the measurements made. There were no measurements made except those positively described in the field notes, and which, as has been seen, have fixed termini marked by monuments which have been identified by Bonillas' survey.

The boundaries thus established can not be deemed "out boundaries."

Maxwell Land Grant Case, 121 U. S., 369-372.

In this case it was obviously the intention to make a comprehensive survey of the tract to be sold, and all the elements of a complete description are employed, viz: monuments, course and distance, and quantity. Ordinarily, these take rank in the order named, and it is only where the intention to make the quantity controlling clearly appears that monuments will be disregarded in favor of the less certain description.

3 Wash. Real Prop., 347, 348, 418.

This rule applies as well to grants from the sovereign as to conveyances between individuals.

Brown vs. Hagar, 21 How., 305.
Ward vs. Crotty, 4 Met. (Ky.), 103.
Fulwood vs. Graham, 1 Rich. (S. C.), 491.

However much the Mexican surveyor may have been mistaken as to the quantity of land contained within the limits of his survey, it does not seem possible to doubt that it was his intention to delineate the exact boundaries of the land registered by the Messrs. Ortiz as he was commanded to do in the order of the intendent. There is absolutely nothing to indicate any other purpose, or that the registered land was a portion only of that surveyed. Throughout the survey the monuments, courses and distances and the quantity are evidently used to describe one and the same thing. This is greatly emphasized by the language used in reference to the delivery of possession to the Ortiz brothers; it is said, "and they considering them-

selves as having received the surveyed land, and being satisfied with the survey, were notified that they should conveniently mark their boundary lines with monuments of lime and stone." If they had received the surveyed land, that must have been the tract previously described, and if they were to mark their boundary lines, those boundaries must have been the ones fixed by this survey. They could not mark boundaries of a tract of four sitios within this larger tract, for no such boundaries had been established, nor could possession of such four sitios have been delivered, because none such had been selected.

The commanding officer then caused to be appraised and valued the land "which had been surveyed in favor of Tomas and Ignacio Ortiz of this place, consisting of four sitios," and ordered them to be put up at auction. The auctioneer offered the surveyed lands on thirty successive days, on the last of which they were bid for by the minister of the mission of San Xavier and the registering parties, and were finally knocked down to the minister for $210, though appraised at $120. Thereafter the proceedings were referred to the attorney general, and upon his report the final auctions were ordered. When, after more bidding, the lands were finally sold to the Messrs. Ortiz.

It is worthy of note that at both the preliminary and final auctions there was rivalry in the bidding, and it is hardly imaginable that such should have been the case unless it were known with certainty what lands were being sold. Especially when the lands were situated in a region where their value was wholly dependent upon the possibility of procuring water. From the description of the lands contained in the inspection by the surveyor, Gonzales (record, pp. 32-33), it appears that the supply of water on this tract is exceedingly limited, and that the utility of the land for raising cattle and horses depends upon the construction of cisterns at the place called la Canoa. Can it be believed that if the bidders at the auctions had supposed that they were purchasing merely the right to an undetermined four sitios to be located within the boundaries described in the survey, and which might or might not include the water supply, that there would have been rivalry, or, indeed, that any sale could have been made.

But this whole question would seem to be conclusively determined by the fact that juridical possession was delivered to the Ortiz brothers at the time of the survey by the officer making it, and in accordance with it.

In this respect the case at bar is again distinguishable from the Ainsa case.

Gonzales, who made the survey and delivered possession, was a judicial officer; he was sub-delegate judge as well as commanding officer of the Company of Tubac. He is so described in the opinion of the attorney general (record 44), and elsewhere in this titulo. He was, therefore, a competent officer to deliver juridical possession. So, also, the grantees were present on the ground. It is so stated and they signed the act reciting the delivery of possession. (Record, p. 35.)

The language used in our titulo is the same as that in the De la Zanja grant, which was held to show delivery of juridical possession in

Cameron vs. U. S., 148 U. S., 309.

If the grant be one by metes and bounds, as we contend, there can, of course, be no doubt that it was located within the meaning of the sixth article of the Gadsden treaty prior to the cession.

The mere fact that there is found more land within the boundaries than the grant calls for, does not make the grant void.

White vs. Burnley, 20 How., 235.
Ward vs. Crotty, 4 Met. (Ky.), 103.

Nor does it show that it was not located.

Fulwood vs. Graham, 1 Rich. (S. Ct. of App.), 491.

In the case last cited it was held no objection to the location of a grant that the quantity is thereafter ascertained to be more than four times the amount stated in the grant or that the lines are prolonged greatly beyond the distances, or that course is sometimes disregarded.

But if it should be considered that the grant is one of quantity, and that the survey by Gonzales was intended only to

mark a larger tract within which the four sitios petitioned for by and sold to the Messrs. Ortiz, should be located, yet, reading in this light, it will be found that the survey definitely locates the particular four sitios.

No particular method of location is stipulated for in the Gadsden treaty, and there is no warrant for requring any special form. The evident object of the sixth article of that treaty was to protect the United States against floating grants, or those which had not attached to any particular land. This object is as well accomplished in the case of a grant which contains the data from which the land may be identified, as though it contained the most complete and formal description.

The grant itself need not even contain such a description as without the aid of extrinsic testimony will ascertain precisely what is conveyed.

Blake vs. Doherty, 5 Wheat., 359.
Cox vs. Hart, 145 U. S., 376-389.

The monuments mentioned in the Canoa title are as much at variance with the courses and distances as with the quantity called for; hence, if the former mark out boundaries, the courses and distances, to be given any effect in interpreting the survey, must be considered in connection with the quantity and as having been intended to describe the particular four sitios. That they do describe exactly that quantity is conceded, and as the starting point is a well-known, fixed place, the exact location of the four sitios intended to be sold is made certain beyond controversy. In this view of the case the location is fixed by the central point, for from that, by following the directions of the survey, the exact limits can be ascertained. *Id certum est quod certum reddi potest.* When a point is fixed from which the boundaries can be ascertained, a grant is not void for uncertainty.

Blake vs. Doherty, 359-364.

So far as the rights of individuals are concerned, Courts in the construction of treaties adopt those general rules applied in the construction of statutes, contracts and written instruments generally.

The Amiable Isabella, 6 Wheat., 1.

U. S. vs. Perchman, 7 Pet., 83.
U. S. vs. Payne, 8 Fed. Rep., 892.
North German Lloyd S. S. Co. vs. Hedden, 43 Fed. Rep., 20.

And when a treaty admits of two constructions, one restrictive of the rights that may be claimed under it, and the other liberal as respects such rights, the latter is to be preferred.

Sharks vs. Dupont, 3 Pet., 242.
Hauenstein vs. Lynham, 100 U. S., 483.
1 Kent Com., 174.

No construction of a treaty which would impair that security to private property which the laws and usages of nations would, without express stipulations have conferred, would seem to be admissible further than its positive words require.

Strother vs. Lucas, 12 Pet., 438.

Certainly no undue liberality of construction is required to hold that the Canoa grant is sufficiently located by the designation of its central point, together with the courses and distances given in the titulo, which describe precisely the quantity called for.

It is respectfully submitted that the record shows a valid, complete and perfect grant by metes and bounds, and that the decree of the Court of Private Land Claims should be affirmed.

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THE UNITED STATES, APPELLANT,

vs.

FREDERICK MAISH AND THOMAS DRISCOLL,

PARTNERS AS MAISH & DRISCOLL.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

STATEMENT AND BRIEF FOR APPELLEES.

ROCHESTER FORD,
Of Counsel for Maish & Driscoll.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1-3-98

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 297.

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STATEMENT AND BRIEF FOR APPELLEES.

Before discussing the merits of this case, a few points in the abstract and statement prepared on behalf of the United States should be noticed. The statement is made (p. 4) that "the petition asked for four sitios of land at the place called La Canoa." This is not stating the whole of the petition, which is as follows:

"We register in the royal name four sitios of land, which we propose to stock with cattle and horses, offering to pay the just price at which they may be appraised. Therefore we humbly pray and petition that you be pleased to order,

if you think fit, that the commanding officer of this military post proceed to the survey of the registered land and take the other steps necessary for obtaining title and confirmation."

The abstract prepared for the Government states (p. 6) that "it will be noticed that this appraisement was not signed by the marker, José Antonio Figueroa, and the measurers, Juan José Orosco and Manuel Castro, who were appointed to fill these positions."

The record shows (p. 35) that the persons appointed as appraisers were "Lieutenant Manuel de Leon and the resident citizen Juan José Orosco," and the appraisement was signed by "those who could write." The inability of Orosco to write ought to be at all times a sufficient explanation for the absence of his signature.

Counsel for the Government states:

"It will be noticed all through these proceedings that four sitios of land was the exact amount offered for sale, without regard to the boundaries or monuments that had been ordered to be placed at the end of the measurements."

We shall try to show that the record is exactly the other way, and that all the proceedings refer not to an exact quantity, but to the tract as surveyed and monumented.

It was admitted by the United States (Rec., p. 23) that this Canoa grant is in its proper place in the archives of the treasurer general of the State of Sonora, at Hermosillo, and that the grant is recorded in its proper place in the Book of Toma de Razon, in the office of said treasurer general. The genuineness of the title papers is conceded. The surveyor, Bonillas, testified that the map of this grant which he made and which was offered in evidence correctly

represents the tract of land called for in the title papers according to the landmarks set out in the title papers, and that he found every monument called for in the title papers, with the exception of the south center monument—not the center monument, as is inaccurately stated at the bottom of page 10 of the brief for the United States—which south center monument had probably been destroyed. This testimony was not questioned, and the tract of land which the title papers state was surveyed was identified beyond any dispute or doubt in any respect whatever.

The dissenting opinion states (Rec., p. 102) that, "without giving each step in detail taken by the officers leading up to a final sale, it is sufficient to say that all the proceedings seem to be in strict conformity with the general practice in such cases at that time," and it is admitted by the Government (Brief for the United States, top of page 8) that the proceedings are regular up to and including the final sale of the land. After the final sale the provincial board of sales issued an order of notice and of its approval in the matter to the superior board of the treasury, and the amount of the purchase-money, with the various taxes and charges, was paid into the national treasury, and a certificate of such payment was duly given on December 21, 1821, signed by the provincial receivers of the national treasury, one of whom was Fuente, the attorney general. Final title was issued in form by the treasurer general of the State of Sonora on February 2, 1849. (Rec., p. 49.)

There is no disputed question of fact in the case. The objections urged by the Government are on questions of law only, and are two:

1st. That "the actions of the various officials in making up this expediente were without lawful authority and vested no equity against the Government;" and,

2d. That "the grant, if valid, was not located."

We shall consider these questions in their order.

ARGUMENT.

The brief and argument for the Government begins with the statement that "the proceedings in this case were initiated at the same time as those for the Sonoita grant, and the cases are to be heard together. In the make-up of the expedientes they are identical down to the point of the issuance of final title."

The examinations made, since the Sonoita case was decided, of the archives at Hermosillo, Mexico, the results of one of which examinations appear in the printed official report of the Government's agents, show beyond question that the actions of the various officials, up to and including the final sale and the payment of the purchase-money into the national treasury of Mexico and the receipt issued therefor, were binding on the Mexican government as the acts of duly authorized officials. The evidence as to this is unlimited and seems conclusive. The three members of the lower court who, on the first presentation of the question in the Sonoita case, were of opinion that the acts of the intendant after the revolution were without authority, came to a different opinion on the presentation of the evidence gained from the search of the archives. On this point, as to the

authority of the officers up to and including the sale, the members of the lower court seem to be now unanimous. Mr. Justice Murray, who on other grounds dissented from the decree confirming this grant, states in his dissenting opinion (Rec., pp. 104–105):

"The evidence shows that sales of lands made by intendants before and after independence were recognized by the Mexican government and final title issued to purchasers. The Republic of Mexico had an undoubted right to deal with its citizens in these matters as it saw fit, and to issue final title without reference to the authority of the officers initiating the proceedings or making the sales."

It must be admitted, it would seem, that all the proceedings up to and including the sale and payment of the purchase price of the land were regular and binding on the Mexican nation, because such sales, made before and after independence, were invariably recognized as valid by the Mexican government. This Court has said in U. S. *vs.* Peralta, 17 How., 343, at page 348 (brief in Sonoita case, p. 29), that "the government of Mexico, since the revolution, has always respected and confirmed such concessions when any equitable or inchoate right, followed by possession and cultivation, had been conferred by the governors under Spain."

A case like the one now under consideration is even stronger, because the purchasers on payment to the Mexican government of the amount due became the equitable owners of the land. The Mexican government retained the legal title, but held it as a trustee for the purchasers. That one who has paid for land is the beneficial owner and entitled to a conveyance of the legal title is unquestionable,

because, subject to the rules of equity, specific performance is as much a matter of right and of course as is a judgment for damages at law.

If the legal title had not been issued in this case, the petitioners would be entitled to a confirmation of their title by virtue of the equity arising from the payment of the purchase-money.

The act of March 3, 1891, provides that a title arising under the treaty shall be decided (sec. 7) "according to the laws of nations" * * * "and the laws and ordinances of the government from which it is alleged to have been derived." The court shall (sec. 8) "determine the matter according to law, justice, and the provisions of this act," and the United States are bound (sec. 13) to act according to "the principles of public law" and "the provisions of the treaty of cession."

In the Arredondo case, 6 Pet., 714, this Court defines the phrase "laws and ordinances" as used in a similar statute. Usages and customs, the Court declares, which existed under the former governments are to be deemed part of their laws and ordinances. The Court said:

> "We cannot impute to Congress the intention to not only authorize this Court, but require it, to take jurisdiction of such a case, and to hear and determine such a claim according to the principles of justice, by such a solemn mockery of it as would be evidenced by excluding from our consideration usages and customs which are the laws of every government. * * * The law of the province in which the land is situated is the law which gives efficacy to the grant and by which it is to be tested whether it was property at the time the treaties took effect."

This Court specifically held in U. S. *vs.* Chaves, 159 U. S., 452, in construing the act of March 3, 1891, that it did not

" perceive in any features of the act an intention to restrict the powers of the Court recognized by the previous decisions." " With such articles contained in the treaties and their meaning submitted to our consideration, we have no difficulty in holding that the question is whether the land in controversy was the property of the claimants before the treaty, and, if so, that its protection is guaranteed by the treaties as well as the law of nations."

The official report of the government gives clear, full, and constantly recurring evidence that the Mexican government recognized the validity of sales such as this and issued final titles thereon. That the lands in controversy were regarded as the property of the claimants before the treaty seems beyond dispute. The reply brief in the Sonoita case gives, at pages 19 and 21, a few of the many instances from the official report of the government showing that such purchasers as these were habitually recognized by officers of the Federal Government, and that final title was issued as a matter of right. There was a continuous recognition during twenty-eight years of the validity of such sales as took place in this Canoa grant. If we put on this question the construction which the former government adopted, it seems absolutely certain from the unquestioned evidence that this land was private property before the treaty. The title papers show that the grantees in this Canoa grant went into possession immediately after the survey, which was finished July 11, 1821, and the documents offered in evidence (Rec., pp. 79, 80) show that when it was attempted to survey another grant, the Sopori, over this land the grantees herein protested, exhibiting their title and claiming the land as their private property. This was

in May, 1853. These facts show that the grantees had remained in possession for more than 30 years since the sale of the land in 1821. This is of itself sufficient to warrant the confirmation of this title under the holding in the Chaves case, *supra*.

2. But these purchasers are the owners of this land not only because they paid for it in full, but also because they afterwards received the complete legal title in form, which was issued on February 2, 1849, by the general treasury of the State of Sonora, on the record showing that the purchasers had paid for this land. For this final title the customary fee of $30 was paid.

As to this final title, the counsel for the United States, on pages 26 and 27 of his brief, commends to our careful consideration what are supposed to be evidently inconsistent positions as to the powers of the intendants and board of sales in selling the land and of the State authorities in issuing final title thereon. What the counsel urges has been carefully considered, and can be directly met and answered according to the interpretation put by the officials of the former government on their own laws.

On pages 68 and 69 of the Record herein and on pages 22, 23, 24, and 25 of the Reply Brief in the Sonoita case are given in full the documents from the Mexican archives, in which, in the year 1831, the commissary general of the Mexican Republic declares that since the law of the classification of the revenues went into effect in Sonora, to wit, on November 1, 1824, "the revenues from lands denounced, surveyed, bounded, auctioned, and possessed prior to said first day of November have been considered one of the revenues

comprised in article 12 of said law"—that is to say, one of the revenues of the State.

We submit that nothing could be clearer than this interpretation of the law of August 4, 1824. Before this law went into effect lands had been habitually sold by the boards of sales for the benefit of the Mexican nation. The validity of such sales was expressly admitted. In many cases like this Canoa grant the lands had been denounced, surveyed, bounded, auctioned, possessed, and paid for prior to November 1, 1824. No one contemplated a confiscation of such lands. On the contrary, it was recognized that the purchasers were entitled to a final title or patent. By whom was this final title to be issued? The statement is unequivocally made that further revenues from such lands belonged to the State. The State, therefore, collected the revenue of $30 due for a final title, and on payment of this sum issued the title in form.

So far from our positions in this case being inconsistent, they are in accord with the very letter as well as the spirit of the Mexican laws as thus officially interpreted. Title was issued by the treasurer general of the State for two reasons: First, because he recognized that the purchasers were the equitable owners of the land by virtue of their payment therefor; second, he, as the representative of the State, was the proper person to issue title, because the payment therefor was one of the revenues of the State and not of the general government.

Repeated laws of the State of Sonora recognized the validity of sales as in this case and provision for final extension of title by the State. Section 27 of the law of May 20, 1825 (Reynolds', p. 131), decreed that—

"Those who possess sitios and who, although they have them registered and surveyed, have not obtained the title, shall present themselves to the treasurer general" of the State, etc.

Section 61 of the law of July 11, 1834 (Reynolds', p. 188), is similar:

"Those who possess sitios and, although they have them registered and surveyed, have not obtained the title, shall present themselves to the treasurer general" of the State, etc.

Similar provisions occur in the laws of August 11, 1831, and May 12, 1835. (Official Report of Government, pp. 104, 105.)

All of these enactments are based on the validity of prior sales, and recognize the right of the purchasers to have final title issued by the State on the payment of proper charges. None of such laws were ever annulled or called in question by the Mexican nation. Such issuance of final title by the State of Sonora was acquiesced in by the general government, and, as heretofore shown, when Sonora was a department controlled by the federal government, the national government, through its duly appointed officials, extended final titles just as the State had done.

The present case is thus in strict conformity both with the written laws and with universal custom. The final title issued to the purchasers was something that they had the right to demand, as shown by the several laws recognizing such right, and was not merely a matter of favor or grace.

The statement of counsel (p. 27 of brief for the United States) that "article 6 of the law of May 12, 1835, places the judgment of denouncement upon this title, so far as the

State could do so," is certainly not borne out by the law itself. This article is as follows:

"Art. 6. All who have arbitrarily occupied, or occupy, lands belonging to this State, are reputed holders in bad faith, as are those who, having allowed the various extensions of time given for legalizing their possessions to pass, have not paid their proper value into the treasury in time, and still continue to defraud the State of its dues, with malicious and culpable dissimulation; upon proof of such reprehensible conduct not only do the holders in bad faith become liable to lose the lands and improvements they have made, but they shall thereafter be liable, besides, to a rental of five per cent. of the value of the land for each year of arbitrary occupation."

It will be noticed that this article, like all the other laws, contains a distinct claim of ownership by the State, reference being to "lands belonging to this State," and provides for a proceeding in which there must be proof "of malicious and culpable dissimulation." The law did not undertake to pass an arbitrary judgment of denouncement upon any lands. As held by this Court in Hornsby *vs.* U. S, 10 Wall., 224, lands did not revert to the Mexican government, nor were they subject to be regranted, without an inquisition and decree. An *ipse dixit* forfeiture was unknown.

That there were no grounds of forfeiture is shown by the fact that in 1849, several years later, the State issued final title in this grant. It thus plainly said that there were then no grounds of forfeiture. If any could have been claimed, the issuance of final title was a waiver of them.

Counsel for the United States contends in this, as in other cases, that the State of Sonora had no ownership of the vacant public lands, and therefore no right to sell them. When confronted with the evidence that the State claimed

the ownership and the right to sell and did, in fact, habitually sell such lands and receive pay therefor, it is claimed (pp. 23, 24 of brief for the United States) that "the State of Sonora, because of its immunity from strict surveillance and control, on account of its great distance from the federal district, had susceptibilities, and susceptibilities that were sometimes dangerous, which may account for its extravagant claims to the public lands from time to time."

But this assertion of counsel is submitted to be contrary to historical facts. Sonora was under strict surveillance by the general government, which promptly annulled the laws of Sonora which were considered objectionable. This was done from the earliest time. For instance, the decree of the federal government of March 9, 1829, declares that the decree of the State of the West, No. 97, of December 20, 1828, relative to one D. Francisco Iriarte, is contrary to article 157 of the federal constitution. (Vol. 1, Leyes y decretos Mexicanos, p. 7.)

Sonora passed many laws for the sale of lands, but passed no colonization law till May 6, 1850. This law was annulled by the Mexican nation on May 14, 1851 (Reynolds', p. 296). The very repeal acknowledged that the States owned the vacant lands. The language used is:

"Art. 2. In the exercise of the power reserved to the general Congress in article 7 of said law of August 18th, 1824, the frontier and littoral States are prohibited from alienating their vacant lands for colonization, until the regulations to be observed in carrying it out are established."

Here, we submit, is the plain admission on the part of the general government that the States owned "their vacant lands," and that they were free to do with them as they

pleased, except so far as they failed to comply with the bases established by the general Congress for colonization.

As to the laws of Sonora for the sales of her lands to her own citizens the general government interposed no objection. That this silence is a sanction and approval of such laws seems too clear for dispute.

The internal evidence, if such it may be called, furnished by the official report of the Government (pp. 83–89) affords the most convincing proof that the sales of lands in Sonora were made with the knowledge and approval of the general government. The attention of the Court is especially invited to the communication sent on February 23, 1839, by Mendoza, who was then the superior chief of the treasury, to the secretary of state and of the department of the treasury at Mexico (Official Report, pp. 83–89). The reply shows that the questions suggested had been laid before the President of the Republic, under whose directions the answer was given.

These communications seem to be worthy of most careful attention. We believe if there were no other evidence, they would sustain our contention that the States owned the vacant lands and had the right to sell them.

In his communication Mendoza first states that "one of the sources of public revenues in this department is that from the composition and sale of lands," and speaks of the "innumerable registries made by breeders of the immense tracts of public lands which this department has."

This is a direct assertion that the department owned these vacant lands and was in the habit of selling them.

The department acquired title to such lands because it had succeeded to the States, which had theretofore owned

them. The preamble to the grant papers in the Nogales grant, passed on by this Court in Ainsa *vs.* U. S., 161 U. S., 208, states:

"Whereas article 11 of the sovereign decree No. 70 of the 10th (should be 4th) of August, 1824, ceded to the old States the revenues which in said law the general government did not reserve to itself, one of which is that from the lands (terrenos) in their respective districts, which therefore belong to them, and for the disposal of which the honorable constituent congress of the State which was Sonora and Sinaloa united, enacted law No. 30 of the 20th of May, 1825, as did also the successive legislatures other decrees concerning them, which enactments have been retained in sections 3d, 4th, 5th, 6th, and 7th of chapter 9 of the organic law of the treasury, No. 26, of the 11th of July, 1834, the said revenue from lands being now one of those of this department of Sonora, which have continued and must continue, as provided in article 1 of the decree of the 17th of April, 1837, that of the 28th of the same month of 1839, and of the 24th of December, 1840, as well as the supreme order of the 21st of said month and year," etc.

No language could be used which would more strongly state the fact that the vacant lands in the States belonged to them. This was the uniform interpretation of the law as announced not only by the State authorities but by the officers of the Federal Government.

Mendoza speaks next "of the multitude of finished expedientes of lands that exist therein" (in the office of the treasury), and of those "the proceedings in which are pending, and from those that are instituted anew more and more every day."

This, it will be noticed, was in 1839. The State of Sonora had been selling lands for many years prior. Such expedientes were then in the archives, as they are now. Their

validity was not called in question. It was taken for granted that the State had the right to make them.

Mendoza then speaks of the various laws regarding lands which the State of Sonora saw itself under the necessity of enacting. Copies of these laws he inclosed. No question was raised as to the validity of such laws or of the sales made under them. Mendoza states that as occasion arose the treasurer general of the State of Sonora consulted the governor, who determined upon the advice of his council or of the honorable Congress. Moreover, questions of litigation regarding such sales were forwarded to the competent courts and tribunals.

All this takes it for granted that the sales by the State were lawful. Never once was the validity of such sales questioned. We ask with much earnestness, Is it possible to believe that the question of the want of power in the State of Sonora would not have been raised in some one of "the multitude of finished expedientes," if there were any doubt as to her right? Is not the acquiescence of all the authorities, of the competent courts and tribunals, absolutely irresistible proof that Sonora was regarded as acting rightfully?

Mendoza then speaks of those cases "that offer no difficulty in their consideration and conclusion, as happens in the matter of vacant public lands, which, without the opposition of any one, are registered, surveyed, appraised, published, and sold and titles issued thereto after the corresponding payments."

The Mexican officials found no difficulty as to the sale of lands in Sonora. The department, as this letter from Mendoza shows, habitually sold lands just as the State had sold them before, and as it sold them afterwards when the State

form of government was resumed. The laws under which such sales were made were always stated as the same, to wit, as set out in the preamble to the Nogales grant, the law of August 4, 1824, by which the public lands of Sonora belonged to her as a State and afterwards to her as a department.

The communication of Mendoza was laid before the President of the Republic, and no objection was suggested by him as to the sale of such lands. We believe it within bounds to say that clearer proof of the practice of the State and department and of the approval by the general government of such practice could not be furnished.

Counsel asks, page 30 of his brief, "Where can it be found that a treasurer general of a State in 1849 had authority to extend a title based upon the law of September 17, 1846, or any other proceedings, law, order, or decree?"

The answer to this is given in the preamble to this Canoa grant, where the recital is that "said mentioned sale of lands being assigned anew to the State, which has continued and will continue to collect revenues (or taxes) by virtue of the general law of classification, dated September 17, 1846."

That law gave to the States "all the revenues, imposts, and taxes established by general laws" which were not specifically given to the federation. The provision is the same as article 11 of the law of August 4, 1824, that "the revenues not included in the foregoing articles belong to the States." This article, as we have shown, meant that the vacant lands and the proceeds from their sales belonged to the States. The same construction was given to the same provision in the law of September 17, 1846. We have shown that "the revenues from lands denounced, surveyed, bounded, auc-

tioned, and possessed prior to the 1st day of November, 1824," were considered one of the revenues of the State. The fee for the final extension of this title was one of the revenues of Sonora, and such title was issued by the proper official, the treasurer general.

Location of this Grant.

That this grant is one by metes and bounds according to the survey set out in the title paper will appear, it is submitted, from the following considerations:

I.

The Language of the Grant.

The titulo shows unmistakably that the sale was of four sitios as surveyed by Gonzales in 1821.

a. The applicants registered four sitios of land and prayed "that the commanding officer of this military post proceed to the survey of the registered land and take the other steps necessary for obtaining title and confirmation." The petitioners were not applying for an unsurveyed quantity, but for four sitios, to be located by a survey prior to their sale.

b. The order of the intendente, Cordero, was that "the commanding officer of the company of Tubac will proceed to the survey of the land which the petitioner registers, calling the adjacent neighbors, and will appoint expert appraisers, who shall fix a just price." The survey was not of a tract within which the land was to be afterwards located, ut was in terms a survey of the land registered.

c. The officer proceeded "to the place called La Canoa in order to carry out the measurement of the four sitios registered by Tomas and Ygnacio Ortiz."

d. The commandant, "in order to proceed to the measurement of the registered land," appointed the officials.

e. The officer "ordered that an inspection and examination of the registered land should be made first," and reported its character and the fact that a well could "be constructed at the place called La Canoa."

f. The officer, "in order to begin the survey of the land registered by Tomas and Ygnacio Ortiz," began at the "spot which the interested parties had designated as a center." The details of the survey are given in full, and the result was as follows:

"From all these measurements it follows that the land is bounded on the north for five leagues, more or less, by the Mission of San Xavier del Bac; on the west only by land inhabited by friendly people allied to us; on the east by land inhabited by the hostile Apaches, and on the south it is bounded by the boundary line of the military post of Tubac. Thus the said measurements were entirely concluded, giving as a result four sitios for the raising of cattle and horses, registered by Tomas and Ygnacio Ortiz, of this place, and they, considering themselves as having received the surveyed land and being satisfied with the said survey, were notified that they should conveniently mark their boundary lines with monuments of lime and stone, as the law demands."
1

The appraisement and valuation were specifically of the "land which had been surveyed in favor of Tomas and Ygnacio Ortiz, of this place, consisting of four sitios, for the raising of cattle and horses." The appraisers reported that "each sitio should be valued at thirty dollars."

g. After the "survey and appraisement of the lands at the place of San Ygnacio de la Canoa, consisting of four sitios for the raising of cattle and horses," had been concluded, they were bid on for thirty days.

h. What was bid on was "the lands of the place called San Ygnacio de la Canoa, and consisting of four sitios for the raising of cattle and horses, surveyed in favor of Tomas and Ygnacio Ortiz."

i. Report of attorney general. This officer recites the petition, the "respective survey from which resulted, without any detriment to adjacent neighbors, four sitios of land for the raising of cattle," which were appraised at the rate of $30 each sitio, and recites "that the Reverend Father Fray Juan Bana bid on the said surveyed land," and the attorney general recommended that the three public auctions of the said lands take place in the capital.

j. "The three public auctions and final sale of the lands referred to in these proceedings" was ordered. The language of the first auction was as follows:

> "Here before this board of the treasury are being sold four sitios of public land for the raising of cattle, situated at the place called San Ygnacio de la Canoa, within the jurisdiction of the military post of Tubac, surveyed in favor of Tomas and Ygnacio Ortiz, residents of that same town, and appraised in the sum of $120, being at the rate of $30 for each sitio, it being necessary to dig a well to make the land useful."

At the last auction "the same statements were made by the auctioneer as on the first auction, with only this differ-

ence: that the public were notified that this would be the final sale," and "in this manner these proceedings terminated, the four sitios of unappropriated land composing the place called San Ygnacio de la Canoa, to which this record refers, being solemnly sold to those who originally registered them."

k. Final judgment was then given by the intendente, who states that he had "examined all these proceedings of survey, appraisement, public sales, auctions, and final sale of the unappropriated lands of the place called San Ygnacio de la Canoa, situated within the jurisdiction of the military post of Tubac and comprising four sitios, for the raising of large cattle and horses, in favor of Tomas and Ygnacio Ortiz, residents of the same." He declared "all the steps taken in that matter to be correct, sufficient, and in accordance with the rules as laid down by the superior decrees," and ordered the parties to pay into the national treasury "the amount of the bid at which they obtained the said land at the final auction" and the customary charges; which amounts were paid on December 17, 1821, into the national treasury, as fully appears by the record.

All this language refers to a sale of the "said surveyed public lands." The language is so clear that no comment on it seems necessary.

II.

The delivery of juridical possession in this grant according to the survey makes it a grant by metes and bounds.

Immediately after the survey was made the grantees "received the surveyed land, and, being satisfied with the survey, were notified that they should conveniently mark their boundary lines with monuments of lime and stone, as the law demands."

This was in the presence of the witnesses and officials, one of whom, the lieutenant commanding, represented the military post of Tubac, on which the land bounded on the south. The representative of the Mission of San Xavier del Bac, on which the land bounded on the north, knew of the survey and bid on the land.

This was an official delivery of the possession of the tract as surveyed, and under all the authorities, a number of which are cited in Ainsa *vs.* United States, 161 U. S., 208, 230, 231, involving the Nogales grant, constitutes the grant one by metes and bounds. This case comes within the very language as well as the principle of the Nogales case. In that case the Court say, at page 227:

"Appellants' contention that Don Elias and his parents took all the public lands north of Casita as one tract by metes and bounds could be sustained only on proof of a determination of such metes and bounds by actual survey and delivery of possession accordingly."

In this Canoa grant we have the determination of a tract by metes and bounds by an actual survey which is not ques-

tioned in any respect, and we have the official delivery of possession accordingly of said "surveyed land."

The Supreme Court held in Cameron *vs.* United States, 148 U. S., 301, 309, that the same language used in this grant showed that "juridical possession had been delivered in pursuance" of the survey previously made. The language in the two grants, as to the delivery of possession, is the same.

III.

The construction put on this grant in 1849 shows that it was a grant by metes and bounds.

It will be remembered that although the lands had been surveyed and the parties put in possession of the surveyed land in 1821, final title was not issued till 1849. When this title was issued it is stated in both the receipt of payment and in the preamble to the grant to be of "four sitios for the raising of cattle and horses, situated in the place called San Ygnacio de la Canoa, in the jurisdiction of the district of this capital, which sitios were surveyed in the year 1821 by the surveyor, Mr. Ygnacio Elias Gonzales," and the grantees were admonished to "keep within the limits of the land, its appurtenances, landmarks, and boundary lines as precisely established in the foregoing statement of survey made in 1821 by the deceased Ygnacio Elias Gonzales."

This Court said in the Nogales case that "no reason was perceived for disregarding the construction put upon the titulo" in that case by the Mexican government in 1882 and 1886, long after the treaty. In this Canoa case we have a construction put upon the grant by the granting

authorities at the time of issuing title, that it was a grant of four sitios "which were surveyed in the year 1821." The contention of the Government is that it was a grant of four sitios which were not surveyed. The grant itself says that they were surveyed, and if the language of the instrument is to control, there can be no question that this is a grant by the metes and bounds of the survey.

It is simply impossible to hold that this grant is a grant by quantity, for such grants were floating grants, while this grant is located by the central point, the Canoa, from which the measurements were made. In respect of this central point, and also of the delivery of possession, it is entirely different from the Nogales grant.

IV.

The grantees acquired by prescription any surplus in this grant.

It will be noticed that though the tract of land sold is stated to consist of four sitios, the grantees paid $210 for the land, which, at $30 per sitio, paid for seven sitios. They went into possession of the surveyed land in 1821, and held the same till the treaty—32 years. They thus acquired any surplus over four sitios, for under the Mexican law "a title with fixed boundaries, although containing more than the grant calls for, may be sustained by prescription for the whole thereof against the sovereign." "It is evident that by virtue of the cedula of 1754 all possessions with or without titles, or with fixed or undetermined boundaries in the

grants, or the possession of more land than is designated in the grant, can be held as against the sovereign." (Hall's Mexican Law, § 56; U. S. *vs.* Chaves, 159 U. S., 452, 464.)

Under every view of this case, it is submitted that this grant should be confirmed according to the metes and bounds of the Bonillas survey, and that the decision of the lower court should be affirmed.

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